

As there has been no appeal the declaration is binding for section 3(4) of Cap. 64 states that such declaration made shall be conclusive evidence for all purposes in respect of the matter or matters to which it relates. The implication is that appellant is considered a native in Sabah and is entitled to be treated as such under the immigration law. As a native he belongs to Sabah.

I would like to go back to the entry permit. As stated, the validity of the entry permit is not in issue. This means that the appellant's right to remain in Sabah is still subsisting. There is no doubt that the Director has power to cancel the permit in the circumstances set out earlier. Whether the circumstances exist depend not only on existing facts but also on facts which may come to light subsequently. However, appellant's right to enter and reside in Sabah does not depend solely on the entry permit. Even if the entry permit were cancelled he can still claim to belong to Sabah by virtue of the Native Court declaration. I am not aware of any law which permits the State Government to expel a native belonging to the State or to extinguish his status which has been acquired according to law. Having regard to the law applicable, my conclusion is, on the undisputed facts, that appellant belongs to Sabah.

I would allow the appeal and grant the first four declarations in terms as stated by the Lord President. The fifth declaration which is in the alternative need not be considered. Appeal allowed with costs both here and the court below.

Wan Suleiman F.J. concurred.

Appeal allowed.

Solicitors: W.K. Loo & Co.

MOHAMED MUSTAFA v. KANDASAMI

[F.C. (Raja Azlan Shah, Chang Min Tat & Syed Othman FJJ.)
December 5, 6, 1978 & February 2, 1979]

[Penang — Federal Court Civil Appeal No. 126 of 1978]

Contract — Written document — Whether creating a lease or a licence — Premises used as eating shop — Construction of document — Evidence Act, 1950, ss. 91 and 92.

Landlord and Tenant — Whether agreement created a lease or licence.

In this case the respondent alleged that he had been given a tenancy of the premises to be used as an eating house. There was a written agreement between the parties which recited that the "lessor wishes to lease to the lessee the said business of an eating house together with the use of the ground floor" but which stated that the "lessor hereby lets to the lessee the ground floor only of the said premises together with the full right and liberty to the Lessee to carry on the business of an eating house on the said premises". A clause in the document stated that the relationship of landlord and tenant did not exist between the parties. The respondent had sought a declaration that he was the tenant of the said premises and was protected under the Control of Rent Act, 1966. The learned trial judge gave judgment in favour of the respondent and the appellant appealed.

Held, allowing the appeal: it was reasonably clear in this case that what was given in the document was a licence. The claim of the respondent must be dismissed and he should give up possession of the premises to the appellant.

Cases referred to:-

- (1) *Tyagaraja Mudaliar & Anor. v. Vedathanni* [1936] M.L.J. 79; A.I.R. 1936 P.C. 70.
- (2) *Cobb v. Lane* [1952] 1 All E.R. 1201, 1202.
- (3) *Errington v. Errington* [1952] 1 All E.R. 149, 155.
- (4) *Booker v. Palmer* [1942] 2 All E.R. 674, 677.
- (5) *Isaac v. Hotel de Paris Ltd.* [1960] 1 All E.R. 348, 352.
- (6) *Pong Kwee Kwei v. Tan Sai Kuy* [1972] 2 M.L.J. 48.
- (7) *Chin See Lian v. Ng Wan Pit* [1973] 1 M.L.J. 115.
- (8) *Mayor, Aldermen and Burgesses of the Borough of Southgate v. Watson* [1944] 1 All E.R. 603.
- (9) *Methani v. Perianayagam* [1961] M.L.J. 5.
- (10) *E.H. Lewis and Son Ltd. v. Morelli* [1948] 2 All E.R. 1023, 1024.
- (11) *Indo-Australian Trading Company Ltd. v. Krishnasamy* [1973] 1 M.L.J. 87, 89.
- (12) *Facchini v. Bryson* [1952] 1 T.L.R. 1386, 1389.
- (13) *Goh Gok Hoon v. Abdul Hamid & Anor.* [1967] 1 M.L.J. 36, 40.
- (14) *Carter v. S.U. Carburettor* [1942] 2 K.B. 288, 291.
- (15) *Mancroft Wagons Ltd. v. Smith* [1951] 2 K.B. 496, 501.
- (16) *United India Fire and General Insurance Co. Ltd. v. Jaffnese Co-operative Society Ltd.* [1971] 1 M.L.J. 118, 122.
- (17) *Addiscombe Garden Estates, Ltd. v. Crabbe* [1958] 1 Q.B. 513, 522; [1957] 3 All E.R. 563, 565.
- (18) *Lissenden v. C.A.V. Bosch Ltd.* [1940] A.C. 412.
- (19) *Wong Yew Chee v. Yong Yong Hee* [1979] 1 M.L.J. 131.
- (20) *Shell Mex v. Manchester Garages* [1971] 1 W.L.R. 612, C.A.
- (21) *Rajenback v. Mamon* [1955] 1 Q.B. 283; [1955] 1 All E.R. 12.
- (22) *Johnson & Anor. v. Moreton* [1978] 3 W.L.R. 538.
- (23) *Aldington Garages v. Fielder* (1978) 247 Estates Gazette 557, 559.

HIGH COURT.

F R.K. Sharma (Abu Hanifah with him) for the plaintiff/respondent.

Thilliamuthu for the defendant/appellant.

Cur. Adv. Vult.

The following judgment was delivered on June 30, 1978:

Gunn Chit Tuan J.: This action by the plaintiff was commenced by a writ of summons dated September 11, 1971. In the statement of claim dated September 24, 1971 he claimed against the defendant for —

- (1) A declaration that the plaintiff is a tenant of the defendant entitled to protection of his tenancy under the provision of the Control of Rent Act, 1966, in respect of such parts of the premises No. 43 Penang Street, Penang as are rented to the plaintiff by the defendant, i.e.
 - (a) the whole of the ground floor of premises No. 43 Penang Street, Penang.
 - (b) a room on the first floor of the said premises including the right to common use of the hall and other conveniences on the first floor by the plaintiff, the members of his family and his customers of the eating shop.
- (2) Damages for breach of terms of oral agreements made in or about the early part of May 1970 and written agreement dated 31st day of July (sic) and made between the plaintiff of the one part and defendant of the other.

- (3) Compensation for loss and damage suffered by the plaintiff by the defendant's illegal acts of obtaining warrant of distress dated 8th day of March, 1971 and wrongfully acting thereon to the detriment of the plaintiff.
- (4) An order that the defendant do refund to the plaintiff all sums of monies received by the defendant in excess of the rent which may lawfully be recovered by the defendant under the provisions of Control of Rent Act, 1966, in respect of said portion of the premises rented to the plaintiff by the defendant.
- (5) An injunction:—
 - (a) to restrain the defendant from interfering with the use and quiet enjoyment of the plaintiff of his aforesaid monthly tenancy.
 - (b) to restrain the defendant from doing or suffering to be done in or upon the premises No. 43 Penang Street, Penang or such parts thereof that are comprised in plaintiff's aforesaid monthly tenancy any act or thing which shall or may become a nuisance, damage, annoyance or inconvenience to the plaintiff, his members of family and his eating shop customers.
- (6) Return of the plaintiff's account books issued to the defendant for perusal.
- (7) Such further or other relief as this Honourable Court may deem just and expedient.
- (8) Costs.

The trial of the action finally began before me on March 24, 1977. It could not be completed within the various periods allocated for the hearing and had to be continued from time to time until May 3, 1978. On that day counsel informed me that by consent the claims in the above-mentioned paragraphs 1(b), (2), (3), (4) and (5) were withdrawn as well as the following claims in the amended defence and counterclaim:—

- (b) Arrears of rent of the business for \$140 being balance due for July 1971.
- (c) Mesne profits at the rate of \$300 per month from August 1971 till delivery of possession of the said business.
- (d) Damages for breach of agreement.
- (e) An injunction restraining the plaintiff from carrying on the eating shop business or any other business on the ground floor of premises No. 43 Penang Street, Penang.
- (f) An order requiring the plaintiff to take down the said sign containing the words "SRI KALIAMMAN VILAS, 43 PENANG STREET, PRO. K. KANDASAMY".

The parties had come to an amicable settlement on those claims and it was agreed that a sum of \$8,500 was due to the defendant from the plaintiff being mesne profits up to May 31, 1978 and that there should by consent be judgment accordingly without prejudice to the plaintiff's right to claim from the defendant's superior landlord arrears of assessment amounting to \$5,020.63 paid by him in respect of 43, Penang Street for the year 1972 up to and including

A the first half of 1978. The only issues which therefore remained for the court's decision were whether there was a tenancy or a licence granted in this case and whether there should be an order for the return of the plaintiff's books of accounts.

In so far as the two remaining issues were concerned, the plaintiff's evidence was that he was carrying on the business of an eating shop at Chettiares' Hall in China Street before he started his present shop called Sri Kalliamman Villas at 43, Penang Street, Penang (P1, 24-C). His lease at the Chettiares' Hall was about to expire when he looked around and discovered that the ground floor of 43, Penang Street was vacant. He made enquiries and found a man called Koori, now deceased, living on one of the top floors of that shophouse. He asked the said Koori about No. 43 Penang Street and was informed by him that the chief tenant was living in Butterworth. Some time in March 1970, Koori brought him to an eating shop in Butterworth where he was introduced to the defendant. After some negotiations the defendant agreed to rent out the ground floor of 43 Penang Street (hereinafter referred to as "the said premises") to him for \$230 per month. The duration of the tenancy was not discussed but he was asked to pay two months' rent as deposit i.e. \$460 and told that he could remain there as long as he paid the rent. The rental of \$230 was to include light, water, the use of furniture and fittings on the said premises, the use of the defendant's eating shop licence and his business name i.e. Nava India Restaurant. On that day he paid the defendant \$230 and paid the balance of the deposit of \$230 on March 15, 1970, after which he appointed one Karupiah s/o Kodaikumari Ambalam (PW6) to look after the furniture and fittings in the said premises.

The plaintiff also said that he maintained accounts of his business. The defendant took away all the account books either in June or July 1971. At one time the defendant thought that he had a good income and asked for more rent and that was why he allowed him to take away his books of accounts which have not been returned to him. Finally, the plaintiff told the court that the defendant wanted the agreement dated July 30, 1970 (D12) to be drawn up because he needed protection under the rent control law as he was collecting excessive rent. The defendant also told him that he would get into trouble with the income tax authorities if someone reported him to them. The agreement was signed for the benefit of the defendant who had told him that he need not worry about it and that it was not intended that the said agreement would be binding on him.

Under cross-examination the plaintiff denied that he was a cook and that he was working for the defendant at 43, Penang Street, from April 1, 1970 until July 31, 1970. He asserted that he started his own business in the said premises on April 1, 1970 and it was agreed that he could carry on there as long as he liked.

When he was shown the original copy of the agreement dated July 30, 1970 (D12), the plaintiff confirmed that he had signed the agreement proper but not the schedule (D13). He could not however

read or write and, being illiterate, he could only write his name and did not read the said agreement.

The evidence of the plaintiff that he was given possession of the said premises in April 1970 as a result of an oral agreement between him and the defendant in March 1970 was to some extent corroborated by the evidence of a Chinese sundry shop-keeper (PW3) who said that he knew the plaintiff and has been to the said premises. He started doing business with the plaintiff some time in April 1970 and sold him goods such as rice, cooking oil and milk on credit. The plaintiff used to buy about 8 to 10 bags of rice from him and he started business with him from April 1, 1970. Under cross-examination this witness said that he used to go to the said premises to take orders from the plaintiff as the latter did not have a telephone in his shop at that time. PW3 appeared to me and I found him to be a truthful witness and he was also able to produce a receipt (P17 & 17T) issued by him in April 1970 to confirm his evidence that he had been to the said premises to do business with the plaintiff in April 1970.

Besides PW3 there were two other witnesses for the plaintiff namely a milk vendor called Uthirapathy s/o Govindasamy (PW4) and a tailor called Harbans Singh s/o Bishen Dass (PW5) both of whom remembered that the plaintiff has been doing business in the said premises since April 1970. In the case of the former he used to sell the plaintiff milk on credit and he remembered that he supplied him with milk from the month of April 1970. The latter said that he knew the plaintiff since he was working at a chettiar's place and he too remembered that he first patronised the plaintiff's new shop at the said premises in April 1970 when he went there to eat "thosai" on an Indian festival day. Under cross-examination PW5 confirmed that the plaintiff, his wife and one or two assistants used to cook on the said premises in April 1970 but it was the plaintiff himself who was collecting money from the customers.

The defendant in his evidence said that he became the tenant of 43 Penang Street in March 1973 and paid a monthly rental of \$174. Prior to March 1973, his father called Seeni Mohamed was the tenant and carried on business there under the name of Nava India Restaurant. His father assigned the business to him in July 1967 by a deed of assignment (D21). After the said assignment the business was registered in his name (P3) and he carried on the business there until July 1970 when he leased it to the plaintiff for one year. He claimed that the plaintiff had come to join him as a cook in April 1970 and that four of them, namely, Koori, one Hyduruce, the plaintiff and himself went to see his father in June 1970 but his father was not in favour of his leasing out the business. The plaintiff asked him a second time in July and once again the four of them went to see his father and it was agreed that the plaintiff should pay him \$230 per month for the licence of the business and \$70 for water and light. The four of them then went to a solicitor and the plaintiff and he signed that agreement (D12) on July 30, 1970. \$460 was paid to him by Hyduruce below the lawyer's office in the presence of the plaintiff. He denied that the plaintiff

took over the business on April 1, 1970 and also said that he had not asked the plaintiff for his account books nor did the plaintiff give them to him.

Under cross-examination the defendant admitted that he knew that he was not the tenant of 43 Penang Street in March 1970. He also admitted that he had told his then solicitor Mr. Lee Cheng Keat in 1975 that he was the chief tenant of the whole of 43 Penang Street at all material times. When he was referred to paragraph 14 of his counterclaim on page 17 of the bundle of pleadings wherein it was averred that "he is the chief tenant of the whole of the premises No. 43 Penang Street, Penang at the monthly rental of \$174.25 and has been so at all material times and is in possession of the monthly relevant rent receipts issued out to him in his name up to date", he said that he might have given his consent to the facts pleaded by the lawyer, who then drafted the counterclaim. But he also said that his then solicitor Mr. Lee Cheng Keat was a Chinese lawyer and might not have understood him and had made a mistake. When questioned further the defendant admitted that the original statement of defence was filed for him by Messrs. Daljit and Vijaya. He also admitted that he had instructed Mr. Vijaya then but said further that the lawyer, Mr. Vijaya, could not speak Tamil as well as the court interpreter.

When referred to paragraph 3 of his statement of defence on page 12 of the bundle of pleadings the defendant said that his then solicitor might have admitted paragraph 6 of the statement of claim in which it has been averred that "it was also a term of the aforesaid (oral) agreements that the plaintiff would deposit and did later deposit a sum of \$460 being the aggregate sum constituting two months' rent for the said tenancy and the fee for the said licence granted to the plaintiff by the defendant". When he was asked to explain why his original statement of defence admitted the averment in the said paragraph 6 of the statement of claim he said that it was a long time ago and he could not remember whether he had instructed his then solicitor about those admissions. When pressed further he agreed that his then solicitor did not know the facts of the case until he had instructed him, but he then went further and said that he was not satisfied with his first lawyer and discharged him in order to instruct lawyer Mr. Lee Cheng Keat. He claimed that even his second lawyer Mr. Lee Cheng Keat did not render him satisfactory service and he therefore changed to his present solicitors.

After the agreement (D12) was shown to him the defendant agreed that he had signed it but said that he did not know what it meant line by line. He claimed that he was not asked by the lawyer who drafted the agreement whether he was the tenant of No. 43 Penang Street. He also claimed that he only told that lawyer that he wanted to lease the business, but then to my surprise, the defendant changed his evidence and said that he did tell the lawyer that he wanted to lease the premises too.

The defendant was also referred to his affidavit appearing on page 13 of the agreed bundle of documents which he had sworn when he applied for dis-

tress against the plaintiff. He first replied that paragraph 2 of the said affidavit was correct. After reading it he again changed his evidence and said that it was not correct and that he should have stated that the \$300 was for "licence fee" and not for "arrears of rent". He said that he was advised by the lawyer who drafted the affidavit and had listened to him.

When he was referred to page 10 of the agreed bundle of documents marked 'A' the defendant denied having received the plaintiff's letter or notice dated February 22, 1971 although it was included in the said agreed bundle of documents. When he was referred to his reply dated February 24, 1971 to the said letter or notice appearing on page 11 of the said agreed bundle 'A' he said he was forgetful and then changed his evidence and admitted that he had received the said letter or notice of February 22, 1971. When asked whether he was calling any of his previous lawyers, the defendant said that he was not subpoenaing any of them to come and prove that they had taken wrong instructions from him.

The defendant was then referred to paragraph 2(c) of the agreement (D12) and he agreed with plaintiff's counsel that a deposit was usually fixed with reference to rent but he could not give any explanation why the figure \$460 was agreed upon if the rent was \$300 as claimed by him. Finally, when he was shown the entries in respect of his business under the Registration of Business Ordinance, 1956 (F3) wherein it was recorded that he had commenced his business on January 1, 1966, the defendant claimed that he actually started his business in July 1967, that is, after his father had assigned the business to him. When questioned further about the inconsistency he said that the entries in pages 2 and 3 of P3 were not made by him. After watching and listening to the defendant for nearly three days during his examination-in-chief, cross-examination and re-examination, I had no doubts and found him to be a most untruthful witness. Apart from the instances cited above, there were many other instances when he changed his testimony and was shown to have told lies.

Among the witnesses called by the defendant was one K.P.M. Abdul Kader s/o K.P. Mohd. Kassim (DW5) who said that he was the governing director of the Penang Civil Storage Company Limited which is the chief tenant of 43 Penang Street, Penang. When this witness was shown the rent receipts marked D19 & 20 he said that they were signed by him and that the last receipt was issued to the defendant's father, S.K. Seeni Mohamed in March 1973 although he had died in 1972! The defendant became his tenant with effect from March 1, 1970. He said that the receipt dated April 27, 1973 (D18) was the first receipt issued to the defendant who had acknowledged the tenancy in the document produced and marked D23. Although the document marked D23 is dated April 27, 1973 it must be noted that it was not stamped until September 9, 1977!

Another witness called by the defendant was Hydu-ruce s/o Abdul Kader (DW6) who claimed that he knew the plaintiff when he was a cook in the chettiar's hall in 1968 after which he went to Nava India Restau-

A rant in April 1970 to be a cook there whilst the defendant was running the restaurant. This witness first said that it was the plaintiff who had asked him to go and see the defendant's father in June 1970 when the restaurant was run by the defendant and owned by the defendant's father. But when he was shown the deed of assignment marked (D21) by defendant's counsel he changed his evidence and said that in 1970 the business was owned by the defendant. Although this witness stated that it was the plaintiff who had persuaded him to go and see the defendant's father this was never put to the plaintiff in cross-examination. Be that as it may, this witness claimed that it was agreed that the rental was \$230 per month plus \$70 for water and electricity. The terms, he said, were noted and given to the lawyer. **DW6** also claimed that he attended the opening ceremony of the plaintiff's restaurant with the defendant in August 1970 but here again this was never put to the plaintiff in cross-examination. Under cross-examination **DW6** conceded that the plaintiff was not only cooking but was also managing his business in the said premises in August 1970, but he denied that the situation was the same in April 1970. Lastly this witness claimed that the agreement was explained to the defendant though he agreed with plaintiff's counsel that the words "Lessor hereby lets to the Lessee the ground floor" are in the said agreement.

E On the evidence adduced by both parties I found, on the balance of probabilities, that in the month of March 1970 there was an oral agreement between the plaintiff and the defendant whereby the former was allowed to enter and occupy the said premises for an indefinite period after paying the defendant a deposit of \$460 being two months' rental of \$230 per month which was agreed to include light, water, use of furniture and fittings and the use of the defendant's eating shop licence and business name. However, on or about July 30, 1970 the defendant managed to induce the plaintiff, an illiterate person, to sign a written agreement which was produced and marked D12. The said agreement does not contain all the terms which the parties had negotiated previously and agreed upon and was not intended to be binding upon them.

G In his submission, Mr. Thillaimuthu, counsel for the defendant, stated that it was not disputed that the premises in question were controlled premises. He submitted that the main issue in this case was the nature of the interest granted by the defendant to the plaintiff pursuant to the agreement marked D12. **H** On this issue, the plaintiff's contention was that he had acquired tenancy rights whereas the defendant has contended that the plaintiff was merely granted the rights of a licensee for a term of one year only.

I During the trial, counsel for the defendant objected when the plaintiff sought to give parol evidence of the negotiations between the parties which the plaintiff had alleged were conducted between them in March 1970, on the ground that the terms of their agreement having been reduced to writing cannot be contradicted, varied, added to or subtracted from, having regard to sections 91 and 92 of the Evidence Act. With respect I did not agree with the contention of counsel for the defendant and had overruled his

objection and allowed the plaintiff to adduce oral evidence relating to the circumstances under which he was allowed to enter into occupation of the said premises on April 1, 1970. In any case, section 92 of the Evidence Act only excludes oral evidence to vary the terms of a written contract and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. Section 91 of the Evidence Act also only excludes oral evidence as to the terms of a written contract. Oral evidence is admissible however to show that a document executed by a person was never intended to operate as an agreement but was brought into existence solely for the purpose of creating evidence about some other matter.

(See *Tyagaraja Mudaliyar & Anor. v. Vedathanni*⁽¹⁾).

On the issue as to whether there was a tenancy or a licence, counsel submitted that to determine whether the interest granted constituted a tenancy or a licence, one must not look so much to the words of the agreement as to the substance of the agreement and each case must be decided on its own merits and in the light of the circumstances disclosed. He referred to the cases of *Cobb v. Lane*,⁽²⁾ *Errington v. Errington*,⁽³⁾ *Booker v. Palmer*,⁽⁴⁾ *Isaac v. Hotel de Paris Ltd.*,⁽⁵⁾ *Pong Kwee Kwei v. Tan Sai Kuy*,⁽⁶⁾ *Chin See Lian v. Ng Wan Pit*,⁽⁷⁾ and submitted that in the present case the circumstances and conduct of the parties showed that all that was intended was that the defendant should have a personal privilege as licensee to run the restaurant on the said premises for a term of one year from August 1, 1970 under the said agreement (D12) with no interest in the land. He pointed out that the court should consider in particular the fact that the defendant himself had been carrying on an eating shop business in the said premises from 1967 to 1970 under the name of Nava India Restaurant and Cafe and he only desired to lease the business with the furniture and utensils for one year to enable him to look after his father's other restaurants. He also urged the court to consider certain covenants in the said agreement which he contended were consistent with the grant of a licence rather than a tenancy and also to consider the fact that the plaintiff did not have exclusive possession of the said premises because 43, Penang Street has only one entrance and people residing on the top floors use that entrance which has a collapsible door controlled by the plaintiff and the said Koori who decide when to shut it. Finally, he pointed out that at the time of the granting of the lease the defendant was not the tenant of the said premises the tenancy of which was still held by his father. He referred to the case of *Mayor, Aldermen and Burgesses of the Borough of Southgate v. Watson*⁽⁸⁾ and contended that the defendant could not grant the lease or create any legal interest in the land in favour of any other person because he had himself no estate in the land out of which he could carve any interest.

Mr. Sharma, counsel for the plaintiff, in his submission stated that the principal claim of the plaintiff was for a declaration that he was a tenant of the whole of the ground floor of 43 Penang Street. He pointed out that the plaintiff was an illiterate person

but was consistent in his conduct and submitted that he only wanted the ground floor of 43 Penang Street and not a running business as he had his own business. He also referred to page 33 of the agreed bundle of documents marked 'A' and pointed out that the defendant had instructed one of his previous lawyer's M/s. Karpal Singh & Co. to terminate the plaintiff's monthly tenancy and argued that the plaintiff was therefore a protected tenant under the Control of Rent Act. As regards the defendant's claim that the plaintiff was his cook in April 1970, counsel contended that it was an after thought as it was never pleaded at any time that the plaintiff was the defendant's cook. In any case, he pointed out that there was no evidence adduced of any salary having been paid to the plaintiff.

Counsel for the plaintiff then referred to the case of *Methani v. Perianayagam*⁽⁹⁾ in which Wee Chong Jin J. (as he then was) held, after referring to the judgment of Harman J. in the English Court of Appeal case of *E.H. Lewis and Son Ltd. v. Morelli*,⁽¹⁰⁾ that the doctrine of tenancy by estoppel is that a tenant may not question his landlord's title and conversely a landlord having by his offer of a tenancy induced a tenant to enter into or remain in occupation and to pay rent, cannot deny the validity of the tenancy by alleging his own want of title to create it. Where the facts justify the creation of a tenancy by estoppel, it follows that a relationship of a landlord and tenant is created between the parties to the estoppel. *Methani's* case was quoted by counsel for the plaintiff in answer to the contention of counsel for the defendant that the defendant could not grant a lease or create any legal interest in the land in favour of the plaintiff because he himself had no estate in the land out of which he could carve an interest. Here I would refer to the following dictum of His Lordship in that case:—

"I understand counsel's argument to be that the doctrine of tenancy by estoppel cannot apply to a case such as this where the grantor had himself no estate or interest in the land and so could not in law create a tenancy but in my opinion the short answer to it is that in such a case the doctrine does apply and that the law is that in such a case the grantor notwithstanding he had no estate or interest in the land is estopped by intentment of law from denying that he had created a tenancy."

With respect, I followed His Lordship's decision and therefore considered that the defendant, who himself became the tenant of 43, Penang Street, Penang, in March 1973, could not, having allowed the plaintiff to enter upon the said premises and to pay rent, later on deny the validity of any tenancy created in 1973 by alleging his own want of title then to create it.

Mr. Sharma then referred to various clauses in the agreement marked D12 and argued that the draftsman of the document knew that once a tenancy was granted the premises could not be recovered except under section 16 of the Control of Rent Act and was, therefore, trying to circumvent the said Act. He then referred to the following clause in the said agreement:—

"3(a) That the Lessee paying the rent hereby reserved and observing and performing the several covenants and stipulations herein on his part contained shall peaceably hold and enjoy the demised premises during the said term without

any interruption by the Lessor or any person rightfully claiming under him,"

and contended that there was no such thing as the quiet enjoyment of a business. He also referred to another clause in the said agreement relating to the right of the defendant "to re-enter upon the demised premises or any part thereof" and pointed out that that covenant only referred to re-entry upon land as one could not physically re-enter a business. He then compared some of the clauses of the said agreement D12 with the clauses of the agreements referred to in the case of *Indo-Australian Trading Co. Ltd. v. Krishnasamy*⁽¹¹⁾ and argued that even the said agreement (D12) did not support the claim of the defendant that a licence and not a tenancy had been created. Reference was then made by counsel to the following passage of Lord Justice Denning in the case of *Facchini v. Bryson*⁽¹²⁾ where His Lordship said as follows:—

"We had had many cases lately where an occupier has been held to be a licensee and not a tenant. In addition to those which I mentioned in *Errington v. Errington* [1952] 1 T.L.R. 231 we have recently had three more, *Gorham (Contractors) Ltd. v. Field* (unreported), *Forman v. Rudd* (unreported), and *Cobb v. Lane* [1952] 1 T.L.R. 1037. In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy. In the present case, however, there are no special circumstances."

Counsel then pointed out that the absence of special circumstances in this case showed that a tenancy was intended.

Another argument of counsel for the plaintiff was that a tenancy had been created because a warrant of distress had been taken out by the defendant in 1971 against the plaintiff. He pointed out that such warrant was only available against a tenant and he referred to section 4 of the Distress Ordinance, 1951 which reads as follows:—

"No landlord shall distrain for rent except in the manner provided by this Ordinance."

He argued that when the defendant took out the warrant of distress against the plaintiff he confirmed the status of the plaintiff as his tenant and had also in the affidavit in his application for distress affirmed that rent of the premises was in arrears. Even the receipts which are shown at pages 15 to 18 of the agreed bundle of documents marked 'A' clearly stated that the rent was for the ground floor of the premises No. 43 Penang Street, Penang, and there was no mention of any business licence whatsoever.

Finally, Mr. Sharma sought to distinguish the said case of *Chin See Lian v. Ng Wan Pir*⁽⁷⁾ by contending that that case was decided on the peculiar facts of that case, that is, because the plaintiff in that case continued to have a share in the profits of the business. He then referred to the case of *Goh Gok Hoon v. Abdul Hamid & Anor.*⁽¹³⁾ in which a tenant carrying on a business at No. 2 Wolferstan Road, Malacca under the name and style of K. Abdul Hamid Restaurant had agreed to lease out the said business, furniture and fittings and utensils to a third party.

A It was argued in that case that the third party was not a tenant but was only a licensee but Ismail Khan J. (as he then was) who heard the case said as follows:—

B "I cannot understand how the business could be severable from the premises. The very fact that the ingenuity of an experienced advocate and solicitor has not proved successful in separating the business from the premises as two distinct entities demonstrates that the lease of the business necessarily included the premises in which the business was carried on."

Counsel, of course, quoted that case to show that in this case there could similarly be no lease of the business without the premises and that the plaintiff was therefore not a licensee but a tenant.

G The principles applicable in resolving the question whether a transaction has created a tenancy or a licence have been discussed in many cases, and it is clear from the authorities that in determining whether the relationship of landlord and tenant or merely that of licensor and licensee has been created between the parties, the intention of the parties is the paramount consideration. The intention of the parties must be sought not from the words of an agreement, but from its substance and from the conduct of the parties and the surrounding circumstances. Even if there is a written agreement, the court has to look at the substance and reality of the transaction and not its form, because a document may be executed with no intention that it should be acted upon and the real intention may be otherwise.

In the present case in finding the true relationship of the parties, it was not necessary, in my view, to consider in detail the terms of the document marked D12 which was not intended to be binding on the parties but was signed by the plaintiff at the request of the defendant for the purpose of some other matter and also in all probabilities after the defendant realised that he had granted a tenancy and tried rather late in the day to salvage the situation by creating a document to attempt to circumvent rent control legislation. What the court therefore had to consider in this case were the surrounding circumstances and the conduct of the parties both before and after the plaintiff was let into exclusive occupation of the said premises on April 1, 1970, subject only to a right of way for the people residing on the top floors of 43 Penang Street, through the front and only entrance.

As Somervell L.J. has said in *Cobb v. Lane*.⁽²⁾

H "But the modern cases (by which we are bound) establish that, if there is evidence as to the circumstances in which the person claiming to be a tenant at will went into occupation, those circumstances must be considered in deciding what the intention of the parties was."

I Here the plaintiff, after having negotiated an oral agreement with the defendant was let into occupation of the said premises by the latter on payment of a deposit equivalent to two months' rental amounting to \$460 and has been managing since April 1, 1970 his own eating shop business there for his own benefit and to the exclusion of the defendant. He has been paying a rental of \$230 per month until June 1970 when he started paying a rental of \$300 per month in consideration of a promise by the defendant to let him have a room upstairs. After the plaintiff was

induced to sign the document dated July 30, 1970 (D12) he was allowed to continue in peaceful and exclusive occupation of the said premises until March 1971 when the defendant applied for a warrant of distress against him on the alleged ground that one month's rent was in arrears. The said warrant of distress was not executed. Considering the evidence of the conduct of the parties and of the surrounding circumstances in this case it was my judgment that a relationship of landlord and tenant had been created. Even if the various clauses of the document D12 were to be considered, it would be seen that the majority therein are covenants such as those for quiet employment and re-entry, which are normally found in standard tenancy agreements. In my opinion, therefore, the true relationship between the parties as revealed by their conduct and the surrounding circumstances was that of the landlord and a tenant and not that of a licensor and a licensee. The plaintiff was originally granted a monthly tenancy of the said premises for an indefinite period. When the said tenancy was terminated by the notice dated May 26, 1972 (see page 33 of the agreed bundle of documents 'A') he became a protected tenant under the provisions of the Control of Rent Act, 1966. (see *Carter v. S.U. Carbuiretter Company*,⁽¹⁴⁾ *Mancroft Wagons Ltd. v. Smith*,⁽¹⁵⁾ *United India Fire & General Insurance Co. Ltd. v. Jaffnese Co-operative Society Ltd.*⁽¹⁶⁾). In the circumstances of this case I therefore made an order declaring that the plaintiff was a tenant entitled to protection under the provisions of the Control of Rent Act, 1966 in respect of the said premises. As I had accepted the evidence of the plaintiff to be more credible and had rejected that of the defendant, I also found that the latter had taken away the former's books of accounts. I therefore also ordered that he, the defendant, do return the plaintiff those books of accounts taken away by him in 1971 as well as pay the plaintiff 75% of the costs of this action. As indicated above, I also made a consent order that the plaintiff do pay the defendant an agreed sum of \$8,500 being mesne profits up to May 31, 1978 without prejudice to his right to claim from the defendant's superior landlord arrears of assessment amounting to \$5,820.63 paid by him in respect of 43 Penang Street, Penang for the year 1972 up to and including the first half of the year 1978.

From the above judgment the defendant appealed.

FEDERAL COURT.

T.R. Hepworth (V. Thevendran with him) for the appellant.

R.K. Sharma for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The short question for determination in the action and in the appeal is whether the respondent held a licence or a lease from the appellant. The premises in question came under the protection of the Control of Rent Act, 1966 and the tenure of the respondent, if a tenant, would be protected and the appeal must fail.

But the determination of this question which is a relatively simple matter of the proper construction of

A the agreement in writing which is in existence was complicated by a fairly extensive body of oral evidence and by an attempt made by the respondent to establish a tacit oral agreement between the parties to treat the written agreement as a dead letter. The trial lasted 12 days spread over some 14 months.

B On the oral evidence, the learned trial judge made no bones about his distrust of the appellant as a witness. He scanned through his evidence, noted the discrepancies and rejected his evidence as being anything approaching the truth. Mr. Hepworth for the appellant who did not appear in the court below, did not seek to persuade us against the finding, though he did suggest that the reasons for dismissing the evidence outright were not altogether sound as, in some cases at least, the apparent discrepancies could be explained if a more human regard was paid to the type and class of witness to which the appellant belongs. But what he said was this: the evidence of the respondent was similarly riddled with inconsistencies and contradictions, which he was at some pains to instance to this court, but in contrast to his attitude to the appellant, not merely did the learned judge not pay sufficient regard to such inconsistencies and contradictions but he paid no regard to them at all. If the learned judge had considered the evidence of the respondent and had noted these inconsistencies and contradictions and had then for good and sufficient reasons expressed himself as being satisfied with his evidence, Mr. Hepworth said he would not be complaining. But he asked us to read through the judgment and to find, if we can, where in that judgment the learned judge had tested the evidence of the respondent, who was the plaintiff in the court below and on whom lay the onus of proving his tenancy, as critically or even as nearly critically as he had the evidence of the appellant.

We need only say that in the course of hearing him, we had not been unimpressed with the exposition of Mr. Hepworth's arguments and the apparent validity of his complaint. Another judge by merely reading the record might well have come to a different view of the respondent but of course he would not have the advantages of seeing and hearing the respondent in the witness box. Neither have we. Such advantages may well be decisive where the evidence consists entirely of proof by word of mouth but as has been noted there is in this case an agreement in writing incorporating the contractual relationship between the parties which subject to a finding of its validity must determine their real relationship, in this case whether what was created by the agreement in writing was a tenancy or a licence.

Judicial assessment of evidence in a trial cannot be said to have been correctly conducted if the same emphasis is not placed on both sides of the encounter. Where the evidence is entirely oral, then it may well be that the issue of credibility as determined by the trial judge is decisive, if regard is had to the burden of proof on the issues raised at the trial, and if he had tested the evidence he is prepared to accept against the whole of the case and for consistency. Where the evidence, however, is partly oral and partly documentary, then in our view and with respect, the

documentary is perhaps to be preferred to the oral, especially where the evidence is at variance and in the absence of any allegation and evidence supporting it of invalidity by reason of fraud, intimidation, illegality or want of due execution, the evidentiary rules for the exclusion of oral by the documentary evidence, statutorily laid down in Chapter VI of our Evidence Act, 1950, must be applied according to the provisions of the several sections in this chapter. It then becomes largely, if not entirely, a matter of construction.

Here the learned judge set guide-lines for himself expressed in these words: "The principles applicable in resolving the question whether a transaction has created a tenancy or a licence have been discussed in many cases, and it is clear from the authorities that in determining whether the relationship of landlord and tenant or merely that of licensor and licensee has been created between the parties, the intention of the parties is the paramount consideration. The intention of the parties must be sought not from the words of an agreement, but from its substance and from the conduct of the parties and the surrounding circumstances. Even if there is a written agreement, the court has to look at the substance and reality of the transaction and not its form, because a document may be executed with no intention that it should be acted upon and the real intention may be otherwise."

Insofar as the intention of the parties is to be garnered from the document itself, the right law has in our view and with respect been stated. But with respect we would for ourselves adopt these words of Jenkins L.J. in *Addiscombe Garden Estates Ltd. v. Crabbe*⁽¹⁷⁾ respectively, as stating the right approach:

"...the principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that a document described as a licence is, merely, on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence."

And later, at page 528 and pages 570-571 of the respective reports:

"...the important statement of principle is that the relationship is determined by law and not by the label which parties choose to put on it and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties."

On an examination of the document in writing between the parties, the learned Lord Justice came to a finding that what was granted was a tenancy and not a licence. The point is that the determination was arrived at by an examination of the document.

So in fact should the document before us have been examined by the trial court. But the learned judge found on the evidence that the document "was not intended to be binding on the parties but was signed by the plaintiff at the request of the (appellant) for the purpose of some other matters and also in all probabilities after the (appellant) realised that he had granted a tenancy and tried rather late in the day to salvage the situation by creating a document

A to attempt to circumvent rent control legislation." He therefore considered the surrounding circumstances and the conduct of the parties both before and after the plaintiff was let into exclusive possession which he found was on April 1, 1970.

B The agreement was dated July 1, 1970 but the respondent alleged and the learned judge found as a fact that the respondent was actually let into occupation on an oral agreement of lease three months earlier. The respondent did aver this oral agreement and this going into occupation earlier than July 1 in his statement of claim. He led evidence which the learned judge accepted. The appellant contended, however, that the respondent in April 1970 was a cook in the business then run by him on the premises and his status was that of an employee and not a tenant. But the learned judge rejected this evidence as he did also the evidence of DW6 Hydruce s/o Abd. Kader, a tax-consultant and someone who was of a somewhat (one is tempted to say, considerably) better education than the litigants, who corroborated the evidence of the appellant on this point and who further added that it was only in June 1970 that approach was made to the appellant's father to transfer the business of the eating house to the respondent for one year, just because he had a faulty recall of the date of the transfer of the business from the appellant's father to the appellant when he had absolutely no reason to lie and nothing to gain by lying in the matter; one fault and his evidence goes down the drain entirely. But it is to be remarked that except for one instance, nowhere in the correspondence between the parties was this allegation of an earlier tenancy made and that it made its first appearance in the statement of claim filed on behalf of the respondent.

F Insofar as the alleged oral tenancy commencing on April 1 can be said to be a fact found by the learned judge on the oral testimony of the respondent, Mr. Hepworth did not seek to persuade us to upset it and to come to our own finding that it was wrong or could not be supported by the evidence considered as a whole. But he argued that if the parties subsequently and voluntarily agreed to enter into another agreement, then it is this subsequent agreement that must be looked at to determine their relationship. *Quilibet potest renunciare juri pro se introducto* — a person may renounce a right for his own use or benefit. The determining factor is voluntariness. The respondent in paragraph 9 of his statement of claim averred that the defendant "insisted and caused" him to sign the agreement. This falls, of course, considerably short of duress which will avoid the agreement and which has to be pleaded and in respect of which particulars have to be given. No question of fraud or misrepresentation was raised. This agreement was said by the respondent to contain (a) some of the terms of the previous oral agreement (b) other oral terms subsequently agreed upon and (c) other additional terms.

G Giving the words used in this particular paragraph of the statement of claim their ordinary meaning and applying the general import of these words in their context, the conclusion is inevitable that in the con-

tention of the respondent, the agreement as finally executed contains all the terms of the agreement between the parties.

We must now deal with the finding of the learned judge that the agreement was not to be binding for the reasons given by him in that part of his judgment which has in this been earlier quoted. What the respondent said in evidence is this: "The (appellant) wanted the agreement drawn up because he wanted protection under the rent control law as he was collecting excessive rent. He was collecting about \$600-\$700 for rooms upstairs. (Appellant) told me so and also that he would get into trouble with income tax if one reported to revenue authorities. Agreement was entered into for benefit of (appellant) who told me that I need not worry about it. (Appellant) told me that though the lease does not refer to the room upstairs, their oral agreement regarding it stood. It was not intended that the written agreement should be binding on me" (p. 63 Record).

If those are the reasons why the agreement was required by the appellant, it will be readily seen how unsubstantial and unfounded they are. Protection under the Control of Rent is afforded to tenants and not to landlords. So far as excessive rents are concerned, the appellant, by collecting \$300 p.m. (though this includes the use of the furniture and utensils for the eating house and the licence) for the ground floor only of premises for which his father paid \$174.25 to the superior landlord, was already collecting excessive and illegal rents for this part of the premises. Since this rent was stated in the agreement and was afterwards confirmed in the receipts, there could be no protection for the appellant as chief tenant. Evidence for the rooms upstairs was available not from the agreement but from the tenants. And if the appellant wanted to avoid disclosure to the tax authorities, the last thing he should do was to commit the actual (excessive) rents he received on paper. Finally, there is not the slightest suggestion for the probability which occurred to the learned judge's mind of an attempt to evade the tentacles of the Control of Rent Act. The respondent did not claim that this was the purpose of the agreement either in his statement of claim or in his evidence. In fact, he relied on the written agreement to establish his claim of a tenancy. In doing so and at the same time by saying that his tenancy was an oral one, he was embarking on the familiar but not permissible course of approbating and reprobating: see *Lissenden v. C.A.V. Bosch Ltd.*⁽¹⁸⁾

The examination of the document which must be conducted must clearly be within the provisions of the Evidence Act. If it is correct that on the pleadings and having regard to the testimony of the respondent himself, the document is the reduction of the transaction between him and the appellant by consent and agreement, then under section 91 of the Evidence Act it must be regarded as the appropriate and only evidence of the terms of their agreement and no other evidence can be substituted for it. And, under section 92, it is conclusively presumed between the parties that they intended the document to contain a full and final statement of their intention and the parties may not therefore give extrinsic evidence

A to contradict, vary, add to or subtract from its terms. On this examination at law, the relationship between the parties will be ascertained.

B It is now necessary to set out the document in some detail. The parties are referred to as lessor and lessee, words, be it noted, more appropriate to a tenancy than a licence. The first recital states that the appellant was the tenant of and the owner of the business of an eating shop carried on the ground floor of premises No. 43, Penang Street (the premises). He was also the holder of the eating shop licence. The second recital is in these words:

C "And whereas the Lessor wishes to lease to the lessee the said business of an eating house together with the use of the ground floor only of the said premises in which the same is now carried on for a term of one year from the 1st day of August 1970 on the terms and conditions hereinafter appearing."

D If this recital correctly expressed the extent of the grant which was offered to and accepted by the respondent, then what was created was clearly a licence. But as so often happens, when particular care has not been exercised in drafting an instrument to set out correctly and precisely the intention of the parties or the terms of their agreement, then inevitably a dispute arises and the court is given the task of resolving the difficulty and unravelling the real purport of the document.

E The *habendum* says that "... the Lessor hereby lets to the Lessee the ground floor only of the said premises together with the full right and liberty to the Lessee to carry on the business of an eating house on the said premises, under the aforesaid licence...."

This is an obvious inversion of the second recital and what was let was expressed to be the ground floor. Rent was payable in arrears.

F Under clause 2 are the usual obligations on the part of the lessee to be performed, including one, (e), not to assign, under-let or otherwise part with possession of the said premises or any part thereof, without the consent in writing of the lessor. But there are two additional obligations more commonly found in a licence of a business. Under (d), the lessee was not to change the nature of the business; under (i) he was to observe all the health rules and conditions imposed by the City Council of Penang on such business.

H Clause 3 contains the usual lessor's obligations, among others, to give quiet and peaceable enjoyment and to pay the superior landlord the rent of the whole house. But it includes at least two which are peculiar:

I "(d) To take all requisite steps and sign all forms and documents as may be necessary or required for the renewal of the Eating House Licence in the name of the Lessor and to permit the photograph of the Lessee or any other person nominated by the Lessee to be affixed to the said Eating House Licence as Manager, or the person in charge or in any other capacity of the said premises. Provided that the Lessor shall not be liable for any debt incurred by the Lessee during the course of running the said business.

(g) To do all minor and major repair and painting or white washing as may be required."

Clause 4 is the usual provision for re-entry if the rents reserved are unpaid or for breach of any of the lessee's covenants.

Then comes Clause 5. It reads:

"5. It is expressly agreed and understood that the right of tenancy whatsoever of the said premises or any portion thereof is intended to be passed to the Lessee by the Lessor and that the relationship of Landlord and Tenant does not exist between the Lessor and Lessee as regards the said premises or any part thereof."

The "the" in the first line is clearly a typing error for "no". In *Facchini v. Bryson*,⁽¹²⁾ the agreement between the parties contained a clause that "nothing in it should be construed to create a tenancy" but this did not prevent the court construing the agreement as a whole, from coming to a conclusion that the agreement operated as a tenancy agreement. Clause 5 therefore by itself is not decisive of the issue.

It is necessary at this stage to diverge and consider the contention that what was let was the ground floor. The use of the adverb "only" both in the recital and in the *habendum* put this beyond argument. Nowhere in the agreement is there any mention of any rooms upstairs. The respondent claimed that a room on the first floor was also let to him. The ground floor was used as an eating shop and City Council regulations prohibit any part of the eating shop from being used for sleeping purposes. There is therefore no provision in the agreement for use of the premises as a home, though of course a lease of premises strictly and entirely for business purposes is still a lease if the clear intention of the parties is to create a tenancy. Despite the absence of any prohibition in the agreement against sleeping on the ground floor, the respondent could not because of health regulations use the ground floor for sleeping purposes. Nevertheless he did so for himself and his family. On March 26, 1971, a notice was issued by the City Health Officer to the appellant as the eating shop licensee and operator requiring him to desist. It was meant for the respondent. It established beyond argument that up to this date, the respondent was not in occupation of any room on the first floor and had no common use of the hall and other convenience in this floor, as he claimed in his writ. But on his own admission, he had used the ground floor for sleeping purposes earlier and as far back as December 12, 1970 (see letter at page 144 Record), the City Council had objected. In this letter to the appellant, he "would beg of you to let me have the room upstairs as agreed so as to house my family." The "as agreed" is intriguing, and is the only pre-trial reference to this alleged lease of a room. In his testimony, the respondent claimed to have at first refused the offer of the tenancy of the entire 4-storeyed house and to have accepted only the ground floor and later, when his family came and stayed on the premises, against City Council regulations, he screened off portions of the ground floor for sleeping purposes. This admission must be a denial of any lease of a room. But he found it inconvenient and he decided to ask the appellant for a room upstairs, and the appellant agreed subject to his paying a further \$70 per month, making \$300 in all. This was said to be in May 1970. If there had been this agreement, then clearly he would have moved into and occupied this room on the first floor, rent being payable in arrears; the written document would in all probabilities had stated that this room was included in the letting and there would

A have been no necessity for him to offend regulations in such a way as to obstruct a renewal of the eating shop licence. Or, if he had been denied the room agreed to be let to him, he would, as one could reasonably expect, have objected. It is, in our view reasonably clear therefore that whatever was agreed between the parties in July 1970, there was no agreement and no evidence supporting it with respect to this or any room on the first floor or any use of any part thereof and that when the respondent needed this room and was refused, the trouble between them that had lasted so many years now, then started.

To return to the document itself: though drafted by a practitioner, there is obviously a conflict between the second recital and the *habendum*. On this point, the agreement stands of course to be construed on the *habendum*. And apart from the use of terms and the imposition of obligations on both parts that are more usual in a lease than a licence, the respondent was obviously given exclusive possession of the ground floor, subject to the right of entry and passage for the other occupiers of the remaining portions of the house.

This court has, in Federal Court Civil Appeal No. 64 of 1978, between *Woo Yew Chee* and *Yong Yong Hoo*⁽¹⁹⁾ decided that exclusive possession is no longer a decisive test to determine that a tenancy has been created. *Hill and Redman's Law of Landlord and Tenant* (15th Edition) at page 17 puts it this way: Firstly, if there is no right of exclusive possession the transaction cannot be a lease. Secondly, if there is a right of exclusive possession the transaction may be either a lease or a licence depending on all the relevant circumstances. The test that this court in *Woo Yew Chee's* case, *supra*, applied is "the nature and quality of the occupancy: whether it is intended that the occupier should have a stake in the premises sub-let or whether he should have only a personal privilege" and applying this test, it came to the conclusion that the respondent Yong Yong Hoo's interest in a half-portion of the ground floor was a tenancy. The same conclusion was reached in *Addiscombe Garden Estates Ltd. v. Crabbe*, *supra*. Each case must of course be considered on the facts pertinent to it.

Shell-Mex v. Manchester Garages⁽²⁰⁾ is an interesting case, concerning the use of a petrol filling station. It falls on the other side of the line. Sachs L.J. speaks of the dominant objective of the contractual relationship between the parties which he finds to be the promotion of the sale of Shell-Mex Company's products on the site. He considers that the terms used to achieve this purpose and the name of promotion were of a special character rarely to be found outside contracts relating to petrol stations and that the document should be and is in substance a licence rather than a tenancy, for a licence best fits into the character of the transaction as a whole.

Lord Denning M.R. has this to say generally:

"It seems to me that when the parties are making arrangements for a filling station, they can agree either on a licence or a tenancy. If they agree on a licence, it is easy enough for their agreement to be put into writing, in which case the licence has no protection under the Landlord and Tenant

Act, 1954. But if they agree upon a tenancy and so express it, he is protected."

The sad fact, however, in this case is that the agreement did not match the high standard of draftsmanship in the *Shell-Mex's* case. It is not as clear cut or as unequivocally stated, save that in Clause 5, *supra*, it was expressed to be a licence. Terms are used and provisions have been made as in a tenancy. But in our judgment, it is reasonably clear that what was given in the document was a licence. The appellant had not given up the ground floor to the respondent for him to use as he liked. The exclusive possession that appeared to have been given was only as to the physical part of the user. The ground floor was to continue to be used as an eating-shop and no other, the licence was to remain and to be renewed in the name of the appellant except that the respondent or his nominee might be named as the manager or person in charge of the business and have his photo affixed to the relevant document. The appellant was to carry out all minor and major repairs and painting or white washing as might be required which though not expressly stated, must reasonably be as required by the City Council Authorities for the purpose of the eating-house business. In the circumstances, the dominant intention of the parties is, in our view, to give a licence to run the appellant's business of an eating-house as the respondent's own for the term with necessarily the use of the ground floor for this purpose. Clause 5 becomes decisive of the special relationship between the parties and the *habendum* must be seen to be an error of drafting.

Into this category of mistake must be placed the unfortunate exercise which the appellant's then solicitors carried out in distraining on the respondent's goods for arrears of rent. Distress is only available to a landlord against a tenant and in the circumstances of the case wrongful but we do not think it quite correct to contend that the distress levied would have converted what was in our view clearly a licence into a tenancy.

In our view, it is not really necessary to say that such a licence is not "contracting out of the statute" which as has been held in *Rajenback v. Mamon*,⁽²¹⁾ and in a number of local cases which have followed this accepted authority, a landlord should be prevented from exploiting. It is not a case of any promise extracted by someone with superior bargaining power that the tenant will give up a protected tenancy at the end of the term or that he will not rely on the protective provisions of the law; *Johnson & Anor. v. Moreton*.⁽²²⁾ It is the case of parties agreeing to a transaction which from its inception lies outside the purview of the relevant Ordinance. The legislation protects a tenancy but not a licence. As Geoffrey Lane L.J. in *Aldrington Garages v. Fielder*⁽²³⁾: "If there was here only a licence and not a tenancy dressed up in the verbiage and trappings of a licence, the landlord was entitled to succeed." See also the passage cited earlier from Lord Denning M.R. in *Shell-Mex's* case.

For these reasons we allow the appeal with costs here and in the court below. The respondent's claim stands dismissed and there will be judgment on the

A counterclaim in favour of the appellant. The amount, as we understand, has been agreed. The respondent will give up possession within two months from the date of this judgment. In the event there are any loose ends to be tied up, there shall be liberty to apply to the High Court.

Appeal allowed.

Solicitors: *Allen & Gledhill; Sharma & Co.*

PUBLIC PROSECUTOR v. ISMAIL BIN YUSOF

[F.C. (Suffian L.P., Raja Azlan Shah, Wan Suleiman, Chang Min Tat & Syed Othman F.JJ.)
January 8 & February 13, 1979]

[Kuala Lumpur — Federal Court Criminal Reference
No. 1 of 1977]

Criminal Law and Procedure — Charge of operating a prohibited fishing gear, namely pukat rawa with fishing vessel — Whether fishing vessel liable to seizure — Whether court bound to make order of forfeiture of vessel — Fisheries (Prohibition of Method of Fishing) Regulations, 1971, s. 2 and Schedule — Fisheries Act, 1963, ss. 14, 15 and 23.

Fisheries — Charge of operating a prohibited fishing gear, namely pukat rawa with fishing vessel — Seizure of vessel — Forfeiture — Fisheries (Prohibition of Method of Fishing) Regulations, 1971, r. 2 — Fisheries Act, 1963, ss. 14, 15 and 23.

Precedent — Whether Federal Court bound by previous decision — Federal Court in error.

In this case a Deputy Maritime Fishery Officer while on patrol found the respondent fishing with a pukat rawa from a fishing vessel off Sungei Buloh in Kuala Selangor. He seized the vessel and brought it to port. The respondent subsequently pleaded guilty to charges of being found operating a prohibited fishing gear with the fishing vessel and of using the fishing vessel without carrying the vessel's licence on board. He was fined \$270/- and the learned Magistrate ordered the forfeiture of the pukat rawa but ordered the release of the vessel to the respondent. On appeal by the Public Prosecutor, the High Court upheld the order releasing the vessel. On application by the Public Prosecutor the learned judge reserved the following questions of public interest for the decision of the Federal Court (1) whether the boat referred to in the Schedule to the Fisheries (Prohibition of Method of Fishing) Regulations, 1971, is liable to seizure under section 14 of the Fisheries Act, 1963, when the fishing net is used contrary to the regulations; (2) whether the court under section 15(1) of the Fisheries Act, 1963, is bound to make an order for the forfeiture of the boat seized under section 14(1) of the said Act when it is proved to its satisfaction that an offence under section 13(1) of the said Act was committed for using for the purpose of fishing a pukat rawa contrary to the Fisheries (Prohibition of Method of Fishing) Regulations, 1971.

Held: (1) the boat referred to in the Schedule to the Fisheries (Prohibition of Method of Fishing) Regulations, 1971, is liable to seizure under section 14(1) of the Fisheries Act, 1963 because the Fisheries Officer had reason to believe that an offence had been committed contrary to the regulations;

(2) when it is proved to the court's satisfaction that an offence under section 13(1) of the Act has been committed of using a net prohibited by the regulations and the boat was used in the commission of the offence, the court is bound under section 15(1) of the Act to make an order for the forfeiture of the boat;

(3) as the use of the prohibited pukat rawa is an offence only if accompanied by its use with a boat propelled by an engine, the boat was a vessel in respect of which the Fisheries Officer had reason to believe that an offence had been committed contrary to the regulations within section 14 of the Act and so was liable to seizure and forfeiture by the court.